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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TONY BARRERA,

Defendant and Appellant.

B284880

(Los Angeles County  
Super. Ct. No. NA104419)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jessie I. Rodriguez, Judge. Affirmed.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

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Following a domestic altercation, defendant Tony Barrera was convicted of assault by means of force likely to produce great bodily injury. On appeal, he contends the trial court prejudicially erred by failing sua sponte to instruct the jury on the lesser included offense of simple assault. Because there was undisputed evidence defendant applied force likely to produce great bodily injury, we find the trial court did not err and affirm.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### **A. Information**

Defendant was charged in an information with one count each of burglary (Pen. Code,<sup>1</sup> § 459) and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). As to the burglary count, the information specially alleged that another person other than an accomplice was present during the offense (§ 667.5, subd. (c)).

### **B. Trial Evidence**

#### **1. *People's evidence***

After defendant's paternal grandmother, Patricia Barrera (Patricia<sup>2</sup>), divorced her husband, she began a relationship with Robert Barron. This new relationship upset defendant and his father Anthony (Patricia's son). On the night of June 5, 2016, Patricia and Barron were together in her house. Seeing defendant and Anthony arrive in an SUV, Patricia told Barron to go into the back bedroom.

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<sup>1</sup> Statutory references are to the Penal Code.

<sup>2</sup> Where witnesses share the same surname, we use their first names not out of disrespect but to avoid confusion.

Defendant came to the front door. Meanwhile, Anthony went to the back of the house and attempted to open the bedroom's sliding glass door. Barron, who was in the bedroom, told Anthony to leave. Anthony kicked the sliding glass door into the bedroom, causing it to fall on Barron and shatter. Barron moved to the bed and grabbed a closed folding knife from the nightstand. Anthony approached and punched Barron in the face, hitting his right eye. Barron ended up lying prone on the bed with Anthony sitting on top of him.

Defendant then entered the bedroom and began punching the left side of Barron's face, striking his left eye. Anthony hit the back of Barron's head. Barron turned, opened the knife and warned Anthony to stop the attack or be stabbed. Anthony did not stop after repeated warnings, and Barron stabbed him in the upper body. Defendant and Anthony continued to hit Barron on the head and face. Barron responded by stabbing Anthony two or three more times, causing Anthony to retreat.

Barron felt dazed and dizzy. Once Anthony released him, Barron tried to leave the room, but he tripped and fell. Defendant grabbed Barron from behind, squeezed Barron's throat in a chokehold, said, "You are going to go to sleep, and you are done," and demanded the knife. Barron began to lose consciousness. Barron warned defendant to release him or be stabbed, and then stabbed defendant's left hand when he failed to comply.<sup>3</sup>

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<sup>3</sup> The facts of the attack are taken from Barron's trial testimony, his preliminary hearing testimony and two pretrial interviews by the police, which the jury heard at trial. Because Barron claimed not to remember what occurred during the

Barron eventually fled from Patricia's house. Outside, defendant told him, "You're done motherf\*\*ker. We're gonna to get you." Barron ran to a friend's house, where he left the folding knife.

Sharo Cervantes, Patricia's sister and defendant's aunt, lived directly behind Patricia. Cervantes testified that on the night of June 5, 2016, she heard Patricia screaming her name. When Cervantes arrived at the back bedroom, she saw that defendant had Barron in a chokehold. Barron's eyes were black and blue; "his face was blue/black," and "it seemed he could not breathe."

Believing Barron "was dying," Cervantes yelled at her nephew to let go and pulled his hair, but defendant did not react. Fearing defendant might kill Barron, Cervantes grabbed a clothing iron and struck the back of defendant's head. Defendant maintained his grip around Barron's throat.

When Cervantes was calling 911, defendant and Barron moved towards the bedroom door. Defendant continued holding Barron in a chokehold, but now with Barron's head down and against the door. To Cervantes, "[i]t looked like [Barron's neck] was going to snap." By now, Barron's complexion was dark bluish red, and he started making grunting or gurgling sounds. To force her nephew to release Barron, Cervantes grabbed at defendant's clothing until she was able to pull him off Barron.

The police arrived, and Barron was transported to the hospital. Barron's eyes were bruised and swollen shut. A laceration was just below his left eyebrow. There was redness

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attack, the trial court allowed the prosecutor to impeach him with his prior testimony and statements.

and some discoloration to the right side of his neck. Barron also suffered bruising to the left side of his face, his jaw line and right forearm. At the time of the preliminary hearing, Barron was experiencing migraines when he was exposed to sunlight.<sup>4</sup>

## **2. *Defense evidence***

Defendant testified in his defense. He denied he was the aggressor or had punched Barron first. Defendant admitted choking Barron, but claimed he was acting in self-defense and in defense of his father Anthony. Defendant testified that after Patricia invited him into the house that night, they heard a “loud bang” and “some commotion” and rushed to the back bedroom. Defendant was astonished to see Anthony, who had agreed to stay in the SUV while defendant visited Patricia. Anthony was bleeding profusely. He turned to defendant and said, “Son, this son-of-a-bitch (indicating Barron) just stabbed me.”

Barron was on the bed holding a knife in his right hand. To prevent him from getting up and stabbing Anthony again, defendant pushed Barron down on the bed. Barron immediately stabbed the palm of defendant’s left hand. In response, defendant straddled Barron and pulled on Barron’s right wrist to draw the knife away. Defendant held on to Barron’s right arm, as Barron swung the knife around wildly, narrowly missing defendant’s face. Defendant was bleeding a lot. At this point, Cervantes struck the back of defendant’s head with the iron.

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<sup>4</sup> Anthony suffered puncture wounds to his shoulder, lower left side and lower back. Defendant sustained a laceration to the palm of his left hand and a wound to the back of his head.

Defendant and Barron fell to the floor and continued their struggle over the knife. Barron ignored defendant's repeated commands to drop the knife. Believing he was going to die and that Anthony, who was pale and bleeding, was in great pain, defendant put Barron in a chokehold. Once defendant realized Barron's face was changing color, he released some pressure. Defendant maintained the chokehold because Barron still refused to drop the knife. Ultimately, defendant's arm became tired, and he released Barron, who fled from the house. Defendant did not recall anyone pulling him off Barron.

### **C. Jury Instructions**

As pertinent here, the trial court instructed the jury on assault by means of force likely to produce great bodily injury, (CALCRIM No. 875), self-defense and defense of another (CALCRIM Nos. 3470, 3472, 3474), and mutual combat (CALCRIM No. 3471).

### **D. The Jury's Verdict and Sentencing**

The jury convicted defendant as charged and found true the special allegation. The trial court sentenced defendant to concurrent terms of two years in state prison.

## **DISCUSSION**

Defendant's sole contention is the trial court prejudicially erred by failing to instruct the jury on the lesser included offense of simple assault. Defendant did not request a simple assault instruction. Nonetheless, a trial court must instruct the jury sua sponte on a lesser included offense " "[w]hen there is substantial evidence that an element of the charged offense is missing." ' ' ' ' (People v. Landry (2016) 2 Cal.5th 52, 96.) Put differently, the

court need not instruct on a lesser offense when there is no evidence that the offense committed was less than the offense charged. (*People v. Barton* (1995) 12 Cal.4th 186, 194–195.)

On appeal, “we review de novo a trial court’s failure to instruct on a lesser included offense” and, in doing so, “view the evidence in the light most favorable to the defendant.” (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.)

Defendant was found guilty of aggravated assault, defined by section 245, subdivision (a)(4) as “assault . . . by any means of force likely to produce great bodily injury.” (See CALCRIM No. 875; *People v. Covino* (1980) 100 Cal.App.3d 660, 668 [great bodily injury is that “which is significant or substantial, not insignificant, trivial or moderate”].) To obtain a conviction under section 245, subdivision (a)(4), it is immaterial whether the force used actually resulted in harm. Instead, the focus is whether the force was *likely* to produce great bodily injury. (*People v. Wingo* (1975) 14 Cal.3d 169, 176 (*Wingo*).) Indeed, an assault may be punishable under the statute even if the defendant makes no physical contact with the victim. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) Thus, while the injuries from an assault are often highly probative of the amount of force used, they are not conclusive. (*People v. Armstrong* (1992) 8 Cal.App.4th 1060, 1065–1066.)

Simple assault is a lesser included offense of aggravated assault. (*People v. Berry* (1976) 18 Cal.3d 509, 518–519.) Section 240 defines simple assault as “an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.”

Defendant argues a simple assault instruction should have been given because there was no evidence Barron actually suffered great bodily injury. In support of this argument, he points to evidence that defendant was acting to prevent further harm to himself and Anthony; that Barron's neck had only redness and bruising; that defendant released some pressure when Barron's color changed; that Barron's nonchoking (facial injuries) were caused by sources other than defendant (Anthony and the sliding glass door); that there was no DNA testing of the blood found at the scene to identify whose blood it was; and that the altercation was brief, after which Barron was physically able to flee and had the presence of mind to take the knife.

We reject defendant's argument for two reasons. First, the evidence that defendant choked Barron to protect himself and his father would not have justified an instruction on simple assault. Such evidence, if believed, would have supported a finding defendant was acting in self-defense or in defense of Anthony and therefore committed no crime at all. The jury was so instructed.

Second, defendant erroneously focuses on the alleged lack of actual great bodily injury to Barron as justifying a simple assault instruction. As stated above, the question instead is whether the force applied—choking Barron until he could no longer breathe—was likely to produce great bodily injury. (*Wingo, supra*, 14 Cal.3d at p. 176.) Barron recounted to the police that he began losing consciousness while defendant was choking him. Cervantes testified Barron was unable to breathe, his face turned dark bluish red, and he made gurgling sounds as defendant continued to squeeze Barron's throat. Defendant acknowledged similar facts. On direct examination, defendant testified he choked Barron by the throat until Barron's face



became “discolored” before lessening his hold. On cross-examination, in response to the prosecutor’s question whether defendant “would admit” that he “strangled” Barron “to the point he was turning blue,” defendant answered, “Yes.”

Applying such force to impede a victim’s breathing shows force likely to produce great bodily injury. (See *People v. Covino*, *supra*, 100 Cal.App.3d at pp. 664–665, 667–668 [assailant squeezed victim’s neck, his thumbs in the area of her larynx, and victim appeared to be gasping and choking, her eyes were bulging and her face red; evidence sufficient for aggravated assault even though it does not cause actual injury]; *People v. Berry*, *supra*, 18 Cal.3d at pp. 518–519 [aggravated assault conviction affirmed because assailant choked the victim until she was unconscious].) Accordingly, on this record, the trial court had no sua sponte duty to instruct on simple assault.

### DISPOSITION

The judgment is affirmed.

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WEINGART, J.\*

We concur:

CHANEY, Acting P. J.

BENDIX, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.